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| Vildaver v Wolkowicki |
| 2023 NY Slip Op 31795(U) |
| May 25, 2023 |
| Supreme Court, Kings County |
| Docket Number: Index No. 513710/2022 |
| Judge: Debra Silber |
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

**GRIGORY VILDAVER, AS EXECUTOR OF THE
ESTATE OF MIKHAIL M. VILDAVER A/K/A
MIKHAEL M. VILDAVER A/K/A MICKIEL VILDAVER,**

DECISION/ORDER

**Index No. 513710/2022
Motion Seq. No. 001**

Plaintiff,

-against-

SHIMON WOLKOWICKI and YELLOW FUNDING CORP.,

Defendants.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion to dismiss the complaint.

| Papers | NYSCEF Doc. |
|---|--------------------|
| Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed..... | <u>3-9</u> |
| Affirmation in Opposition, Affidavits, and Exhibits Annexed..... | <u>11-19</u> |
| Reply Affirmation..... | <u>20-21</u> |

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

In motion sequence #1, defendants move, pre-answer, to dismiss the plaintiff's complaint pursuant to CPLR 3211(a)(1), that is, based upon a defense founded on documentary evidence. After oral argument, the motion is granted in part and denied in part.

This action was commenced on May 11, 2022 by plaintiff, executor of his father's estate. In the complaint, he asserts seven causes of action. He claims that his father, before he passed away, had, for some purpose not clearly established, transferred funds to defendants, who had been managing the taxi medallion which decedent owned. The

decedent passed away on September 9, 2020, and plaintiff was appointed Executor on March 3, 2021 by the Kings County Surrogate's Court. On June 2, 2021, just three months later, plaintiff executed a document he refers to as a contract in the complaint. In this document, he agreed to accept \$300,000 on that date, with \$500,000 to be paid within 30 days, which is described therein as the "full principal" of the loan defendants owed to the decedent's estate. There is no dispute that the full sum of \$800,000 was paid.

However, in the second paragraph of the contract, defendants agree to look through their records to determine if they had paid the monthly interest payments to the decedent for the years 2017-2020, and to tender this "accounting" within 30 days, and to pay any unpaid interest payments within 60 days of the date of the contract. The contract further provides that "Upon receipt of the full principal, plus all accrued interest, Shimon Wolkowicki shall be fully released from any and all further liability to the Estate of Mickiel Vildaver." Defendants claim they tendered the accounting, which concluded that they owed plaintiff \$13,212.66 [Doc 20] but plaintiff rejected that conclusion, would not accept payment, and filed suit. Defendant Wolkowicki attaches what he claims is this "accounting" at Document 9. The court finds this document to be unreadable and incomprehensible, and it certainly is not "documentary evidence." It is noted that defendant corporation is not a party to this "contract."

Thus, the amount of interest plaintiff is owed is in dispute, although the principal has been paid in the amount agreed upon, and plaintiff has released defendants with regard to the principal owed, in a document he agrees he signed and which he agrees was a "contract".

Plaintiff now claims that the "contract" is not binding on him, as "a release may be invalidated for duress, illegality, fraud, or mutual mistake" [Doc 11 ¶29] and that the defendants somehow concealed and misrepresented to plaintiff "whether additional funds

were entrusted to or held by them.” There is no reason given by plaintiff for signing the document when he signed it. He now claims that once he was able to go through his deceased father’s papers, he has learned of additional claims, but he had already released defendant Wolkowicki, and concomitantly, defendant Yellow Funding Corp. from any claim for principal owed to his decedent.

To be clear, for a release to extend to claims both known and unknown, which defendants claim is applicable here, it must have been both "fairly and knowingly made" (*Mangini v McClurg*, 24 NY2d 556, 249 N.E.2d 386, 301 N.Y.S.2d 508 [1969], quoting *Farrington v Harlem Sav. Bank*, 280 NY 1, 4, 19 N.E.2d 657 [1939]). This does not necessarily mean that the releasor must show that he or she was induced to execute the release by fraudulent means. Rather, "[t]he requirement of an 'agreement fairly and knowingly made' has been extended . . . to cover other situations where because the releasor has had little time for investigation or deliberation, or because of the existence of overreaching or unfair circumstances, it was deemed inequitable to allow the release to serve as a bar to the claim of the injured party" (*Mangini* at 567; see also *Haynes v Garex*, 304 AD2d 714 [1st Dept 2003]; *Starr v Johnsen*, 143 AD2d 130 [1st Dept 1988]).

As in *Johnson*, defendants here have established their burden of demonstrating that the Release was unambiguous and is enforceable. Plaintiff’s arguments that he should not be held to the terms therein are unavailing. He has not set forth any evidence of fraud, duress, illegality or mutual mistake. His failure to investigate the estate’s claims properly before he signed the “contract” can only be attributed to his own conduct, that is, his failing to diligently determine the estate’s claims before settling them. Thus, the release stands.

Accordingly, the court grants defendants' motion to the extent of dismissing the causes of action sounding in breach of fiduciary duty (first), conversion (second), fraud (fifth), and unjust enrichment (sixth).


The court denies defendants' request to dismiss the third and fourth causes of action sounding in breach of contract as it applies to the claims of unpaid interest, and the portion of the seventh cause of action for an accounting. However, unless there was a written loan agreement with an attorneys' fees provision, the claim in the seventh cause of action for attorneys' fees cannot go forward. The claim in the seventh cause of action for punitive damages is dismissed.

Finally, it must be noted that the contract was solely between plaintiff and defendant Wolkowicki, with no mention of defendant Yellow Funding Corp. While the third cause of action, against Wolkowicki only, is for payment of interest for the period specified in the contract, the fourth cause of action, stated to be against both defendants, asserts that both defendants owe interest for the six year period prior to the commencement of the action. However, this fourth cause of action can only be asserted against defendant Yellow Funding Corp., as the release clearly released defendant Wolkowicki for unpaid interest payments for the time period prior to 2017.

Defendants shall answer the complaint within 20 days of service upon their attorneys of this order with notice of entry. The case shall appear on the Intake calendar for the uploading of a Preliminary Conference order, no appearances required, on July 20, 2023.

This constitutes the decision and order of the court.

Dated: May 25, 2023

ENTER : 

Hon. Debra Silber, J.S.C.